its entire significance in the absence of information concerning the items of costs which defendants now seek to tax.

Furthermore, in view of the fact that judgment in some amount must ultimately be rendered in favor of the petitioner, it is neither just nor proper that petitioner be required to pay any money to defendants as costs before it has been paid any part of the amounts due it by reason of the breach of the bond executed to it by defendants.

No previous application has been made to any court or judge for the relief herein requested, except that the above-mentioned order, dated March 24, 1936, has been obtained from the Circuit Court of Appeals to show cause why its order for mandate should not be amended so as to provide that costs abide the event of the retrial of such action.

Application is made to this court because the defendants claim to be taxing their costs by authority of the mandate of this court, even though such mandate makes no specific reference to the costs in the Circuit Court of Appeals.

Application is made to this Court because also of its plenary power to amend its mandate with respect to costs to any party in any of the lower courts.

WHEREFORE petitioner respectfully prays for an order construing or amending the mandate of this court so as to provide that defendants shall not recover costs in the Circuit Court of Appeals, or in the alternative that such costs shall abide the event of the retrial of the action, and for such other and further relief as may be just and proper.

Dated, New York, March 27, 1936.

ALFRED T. DAVISON,
Counsel for Petitioner,
The Prudence Company, Inc.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935—No. 270.

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE.

BRIEF IN SUPPORT OF MOTION TO CONSTRUE OR AMEND MANDATE.

The Motion.

This motion seeks an order construing or amending the mandate of this court to provide either (1) that the defendants (the defeated party in this court) are not entitled to costs in the Circuit Court of Appeals or (2) that the costs in the Circuit Court of Appeals shall abide the event of the new trial of the action.

Although the only mention of costs in the mandate of this court is the statement, "The Prudence Company to recover its taxable costs in this court", and although no mandate has been issued by the Circuit Court of Appeals, the defendants claim the right under the mandate of this court to tax their costs on the appeal to the Circuit Court of Appeals.

The amount of costs involved is $10,707.49, principally representing the amount of "premium paid for supersedeas

bond", to stay the execution of the judgment of the District Court.

The necessary facts are set forth in the foregoing motion.

This court has jurisdiction of the present motion.

There can be no doubt that this court has jurisdiction, during the term, to interpret or modify its own mandate. An example of the exercise of such jurisdiction is *United States* v. *Reading Co.*, 228 U. S. 158.

The doubts which exist as to the right to appeal for error affecting only matter of costs (*The James McWilliams*, 49 F. (2d) 1026, C. C. A. 2) require that this court determine the matter immediately, rather than await action by the lower court, and appeals therefrom.

Because the costs now sought to be taxed pertain to the appeal to the Circuit Court of Appeals, and also because of the limited nature of this court's grant of certiorari, petitioner has moved in the Circuit Court of Appeals also for an amendment of its order for mandate. Especially in view of the amount involved, caution required that such action be taken.

We submit, however, that full jurisdiction resides in this court by virtue of the writ of certiorari issued by it, and that no costs may be taxed in any court except as allowed by the mandate of this court.

The jurisdiction of this court includes the power to make directions with respect to costs in the Circuit Court of Appeals. This power is clearly recognized in *Barber Asphalt Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 387. In that case this court, although reversing the judgment of the Circuit Court of Appeals, nevertheless directed that the appellant pay the costs, both in this court

and in the Court of Appeals. See also *Collie v. Fergusson*, 281 U. S. 52, 57.

This court, therefore, has power in this cause to direct,—if indeed that be not already the effect of its mandate,—that defendants shall not recover their costs in the Circuit Court of Appeals.

I.

The mandate does not authorize the taxation of costs in favor of defendants.

The pertinent portions of the mandate of this court read:

> "The judgment of the Circuit Court of Appeals is * * * modified as indicated in the opinion of this Court and, as thus modified, affirmed, The Prudence Company to recover its taxable costs in this Court.
>
> * * * * * * *
>
> And it is further ordered, That this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of New York for further proceedings in conformity with the opinion of this Court."

The opinion of this court requires a new trial, but makes no reference to any award of costs to defendants, the unsuccessful parties. On the contrary, the allowance of costs to petitioner is clear evidence that the decision of this court, although in terms a modification, was in substance in its favor.

It is true that the order for mandate of the Circuit Court of Appeals provided that the decree "is reversed with costs", but it is not to be presumed that such costs are still

to be awarded after a substantial modification (practically a reversal) of the Circuit Court of Appeals' judgment by this court, with no mention by this court of the costs below.

In case of modification or reversal, costs are not awarded as of course, but rest in the discretion of the appellate court (6 Cyc. Fed. Procedure, Sec. 3047), which may "otherwise order" (Supreme Court Rule 32 (3), Second Circuit Court of Appeals Rule 28 (3)). When costs have been awarded to the petitioner by this court, there is no basis for a taxation of costs by defendants.

II.

The mandate of this court, if it may be construed as authorizing taxation of costs in the Circuit Court of Appeals to defendants, should be amended to provide that such costs be denied, or else abide the event of the new trial.

The decision of this court removes any substantial benefit which defendants might have obtained from the judgment of the Circuit Court of Appeals, and thus makes it improper to award costs in the Circuit Court of Appeals absolutely to defendants.

Provision that costs shall abide the event, in case a new trial is ordered, is the established rule in the courts of New York State. (*Wynkoop Hallenbeck Crawford Co.* v. *Western Union Tel. Co.*, 268 N. Y. 108, 113; *Noonan* v. *Sonn & Co.*, 268 N. Y. 462; *Gordon* v. *Krellman*, 207 App. Div. 773, 783; *Shewan & Sons* v. *Union Sulphur Co.*, 139 Misc. 860.)

No Federal statute covers the subject of costs in case of reversal or modification on appeal, or directs any different rule.

The Federal courts, having discretionary power with respect to the award of costs in case of reversal and remand, should properly follow the state rule. See *Ethridge* v. *Jackson*, 8 Fed. Cas. No. 4,541; *Huntress* v. *Town of Epsom*, 15 Fed. 732; cf. *Ex parte Peterson*, 253 U. S. 300, 317.

The results of the defendants' appeal do not justify an award of costs to them.

The only question before this court on certiorari was the measure of damages to which petitioner would be entitled on a new trial. The decision of the Circuit Court of Appeals had already eliminated all the purported total defenses asserted by defendants.

This court restored the only major item of damages which the Circuit Court of Appeals had disallowed. Out of total damages (exclusive of interest thereon) allowed by Judge Galston of $665,654.66, the items of taxes, insurance premiums, and interest lost, representing the damages for delay by reason of the failure to complete the building within the time guaranteed by defendants, amounted to $369,477.53. This court held, in its opinion, that petitioner's proof of such items was sufficient at the first trial.

Whatever justification the Circuit Court of Appeals may have had for awarding costs absolutely to defendants who had succeeded in reducing an award of damages by more than half, the entire justification for an award of costs is removed when such item has been restored to petitioner by this court.

The remaining issue on which the Circuit Court of Appeals directed a new trial,—and which was not before this court,—is insubstantial and of only trivial effect, if any, on the amount of the ultimate judgment. That court

held—in spite of the provision in the surety bond itself, that no changes from the plans and specifications should be binding on petitioner unless (1) in writing (2), signed by duly authorized officers of the petitioner, and (3) specifying the particular items so released—that defendants should have been permitted to introduce evidence tending to show parol consent by petitioner's president to certain substitutions made, and that such evidence might have been relevant *if* petitioner's president had authority to waive the requirement of written waiver. The only evidence of any sort meeting that description was a question put to Mr. Grad, former architect for the builder, whether he had not, after his discharge, told petitioner's president about "certain things which in your opinion were not in accordance with the plans and specifications". Since there was (1) no written waiver or release to the defendants, (2) no signature by a duly authorized officer of petitioner, and (3) no specification of any item released, this court may not be asked to presume that the result of consideration of such evidence on a new trial will be any material reduction of the damages by reason of omissions and substitutions. Any reduction whatever is hypothetical and, we contend, will prove non-existent.

As the case stands, therefore, the defendants are indebted to petitioner in an amount still unliquidated, but which may (without interest) amount to as much as $709,000.* They should not be rewarded for the delay in liquidation of the amount due by a direction that the petitioner (their creditor) pay them—in advance of any payment to it on account of its debt—over $10,000 of claimed costs.

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* This will be the amount of the recovery if certain minor items which Judge Galston held were not sufficiently proved at the first trial, are included in the judgment at the second trial.

III.

Costs of the supersedeas bond should in any event be denied under the mandate of this court.

Under certain circumstances, where a defendant has obtained the final dismissal of the complaint against him, the practice in the Second Circuit has permitted the taxation of the costs of a supersedeas bond (*Williams* v. *Sawyer Bros.*, 51 F. (2d) 1004). No case which we have discovered permits the taxation of such an item, however, where defendant has obtained only a direction for a new trial, with the possibility of plaintiff obtaining the same or a greater verdict upon such new trial.

The only theory of taxing a supersedeas bond as costs, must be that the payment was necessary to prevent the collection of sums not justly due from defendant. In this case there has been no final determination that the sum bonded by the supersedeas bond is not in fact justly due. The decision is merely that the determination of the precise amount must await liquidation at a new trial. Defendants therefore should not be permitted to claim from petitioner the cost of such bond.

The usual rule forbids inclusion of the premium on a supersedeas bond as costs in any case. *Lee Injector Mfg. Co.* v. *Penberthy Injector Co.*, 109 Fed. 964 (C. C. A. 6).

Conclusion.

This court should enter an order herein ~~recalling~~ construing or amending its mandate so that it shall provide that defendants shall not recover costs in the Circuit Court of Appeals, or in the alternative, that costs in the Circuit Court of Appeals abide the event of the new trial.

Dated, New York, March 27, 1936.

Respectfully submitted,

ALFRED T. DAVISON,
Counsel for Petitioner.

ORRIN G. JUDD,
ALFRED T. DAVISON,
of Counsel.